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Supreme Court, U.S.
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In The

Supreme Court of the United States

ROGER DRACH,

Petitioner,

v.

LOUIS BRUCE,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I

Whether, under 28 U.S.C. § 2253(c), a Certificate of Appealability should issue to review a first-time *habeas corpus* petitioner's good faith claim that the statute of limitations for *habeas* petitions contained in 28 U.S.C. § 2244(d)(1) should not be applied to him because that statute's one-year limitation violates the bar on suspending the privilege of *habeas corpus* contained in Article I, § 9, of the Constitution of the United States.

II

Whether, under 28 U.S.C. § 2253(c), a Certificate of Appealability should issue to review a first-time *habeas* petitioner's good faith claim that the statute of limitations for *habeas* petitions contained in 28 U.S.C. § 2244(d)(1) should not be applied to him because that one-year limitation prevents him from ever being able to protect himself against his unlawful detention in any meaningful forum, in violation of the guarantee of Procedural Due Process contained in the Fifth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED – Continued

III

Whether the United States Court of Appeals for the Tenth Circuit's holding that under 28 U.S.C. § 2253(c) a Certificate of Appealability should not issue to review a first-time *habeas* petitioner's good faith claim that the statute of limitations for *habeas* petitions contained in 28 U.S.C. § 2244(d)(1) violates Article I, § 9, of the Constitution of the United States, and the Due Process Clause of the Fifth Amendment to the Constitution of the United States conflicts with the holdings of this Court in *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

LIST OF PARTIES

The parties to the proceedings below were Roger Drach, the petitioner, and Louis Bruce, Warden of Hutchinson Correctional Facility, the Kansas prison where Mr. Drach currently is incarcerated.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioner Roger Drach respectfully prays that this Court issue a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit to review its judgment entered on December 31, 2008, denying Mr. Drach a Certificate of Appealability and dismissing his appeal.

OPINIONS BELOW

This is a case of first petition for a writ of *habeas corpus* by Petitioner Roger Drach, a Kansas state prisoner, under 28 U.S.C. § 2254. It was heard first in the United States District Court for the District of Kansas (Case Number 07-3135-SAC), which dismissed it as time-barred (Appendix 14, 15) and denied him a Certificate of Appealability (App. 16). Mr. Drach appealed to the United States Court of Appeals for the Tenth Circuit (Case Number 08-3052), which denied him a Certificate of Appealability and dismissed his appeal (App. 8). Justice Stephen Breyer, acting in his capacity as Circuit Justice for the Tenth Circuit, also denied a Certificate of Appealability (Case Number 08A619) (App. 9). The order of the Court of Appeals denying the petitioner a Certificate of Appealability and dismissing his appeal is unreported (App. 1). Justice Breyer's order is unreported (App. 9). The judgment of the District Court is unreported (App. 10), as is its order denying Mr. Drach a Certificate of Appealability (App. 16).

Earlier, Mr. Drach sought post-conviction relief under Kansas Statutes Annotated (K.S.A.) § 60-1507, in the District Court of Finney County, Kansas (Case Number 04-CV-152), and the Supreme Court of Kansas (Case Number 93,654). *See Drach v. Bruce*, 281 Kan. 1058, 136 P.3d 390 (2006), *cert. denied*, 549 U.S. 1278 (2007). The underlying criminal prosecution was pursued in the District Court of Finney County, Kansas (Case Number 96-CR-421), and the judgment of conviction was affirmed upon direct appeal by the Supreme Court of Kansas, *State v. Drach*, 268 Kan. 636, 1 P.3d 864 (2000).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its judgment on December 31, 2008. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 9, of the Constitution of the United States provides, in pertinent part: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The Fifth Amendment to the Constitution of the United States provides, in pertinent part: "No person

shall be . . . deprived of life, liberty or property, without due process of law . . . "

STATUTORY PROVISIONS INVOLVED

This case concerns the Constitutionality of 28 U.S.C. § 2244(d)(1), the statute of limitations on petitions for writs of *habeas corpus* by persons in custody pursuant to the judgment of a State court. This statute was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, §§ 101 and 106, 110 Stat. 1217, 1220. 28 U.S.C. § 2244(d)(1) provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

Appellant Roger Drach is a Kansas state prisoner (App. 1). He is 72 years old. He is serving a sentence of twenty-five years to life imprisonment after a wrongful conviction in the District Court of Finney County, Kansas, for the murder of his late wife, Deanne Drach, in 1997 (App. 2). After a plea of not guilty, a jury convicted Mr. Drach of the crimes of murder in the first degree in violation of Kansas Statutes Annotated (K.S.A.) § 21-3401, aggravated battery in violation of K.S.A. § 21-3414(a)(1)(a), and criminal use of weapons in violation of K.S.A. § 21-4201(a)(1) (App. 2).

Mr. Drach is innocent. He has maintained his innocence at all times in every court before which his case has come (App. 2). Only grossly unconstitutional errors at his trial bamboozled the jury into finding him guilty.

Mr. Drach petitioned the United States District Court for the District of Kansas for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254, outlining five grounds for *habeas* relief, all of which pertained to the violations of the Constitution of the United States at his trial (App. 2-3). All of his claims were raised before the Kansas courts either on direct appeal or on his request for post-conviction relief (App. 2-3). *See State v. Drach*, 268 Kan. 636, 1 P.3d 864 (2000); *see also Drach v. Bruce*, 281 Kan. 1058, 136 P.3d 390 (2007), *cert. denied*, 127 S. Ct. 1829 (2007).

The underlying grounds for *habeas* relief which Mr. Drach presented to the District Court are these:

(1) The state trial court denied him the ability to present the substantial exculpatory evidence of the decedent's suicide note through the expert testimony of a forensic psychiatrist, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments;

(2) The state trial court failed to declare that the assistant prosecutor in Mr. Drach's case – who Mr. Drach previously had consulted on a related civil wrongful-death case – had an impermissible conflict of interest, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments;

(3) The state trial court impermissibly allowed a surprise witness to testify for the prosecution on rebuttal to give

testimony which did not rebut any portion of the defense's case but rather which prejudiced the jury against Mr. Drach, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments;

(4) The state trial court impermissibly allowed the admission of hearsay testimony – the only evidence which tipped the scales in favor of the prosecution – under a perceived sweeping *res gestae* hearsay exception, and the Supreme Court of Kansas, while invalidating *res gestae* as a permissible exception to the hearsay rule, held instead that it was admissible under Kansas's now-abandoned, unique, judicially-created "marital discord" hearsay exception, all in violation of the Confrontation Clause of the Sixth Amendment, as interpreted by this Court, especially in *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny, *Idaho v. Wright*, 497 U.S. 805 (1990), *White v. Illinois*, 502 U.S. 346 (1991), and *Lilly v. Virginia*, 527 U.S. 116 (1999); and

(5) Mr. Drach's conviction was obtained in violation of the Confrontation Clause and right to effective assistance of counsel contained in the Sixth Amendment because his trial counsel deprived him of his right to testify on his own behalf.

(App. 2-3).

Previously, Mr. Drach had exhausted all the post-conviction remedies which exist under the law of Kansas (App. 3). He never previously had filed a *habeas* petition before a United States District Court (App. 3).

In his petition, Mr. Drach admitted that he could not meet the one-year statute of limitations of 28 U.S.C. § 2244(d)(1) (App. 3). Additionally, he admitted that he could not meet either the "actual innocence" exception of *House v. Bell*, 547 U.S. 518 (2006) (not because he was not actually innocent, but because he had no "new evidence" tending to prove his innocence), or the "equitable tolling" exception as outlined in *Burger v. Scott*, 317 F.3d 1133 (10th Cir. 2003) (App. 3).

Instead, Mr. Drach argued that the statute of limitations violated the Suspension Clause contained in Article I, § 9, of the Constitution of the United States, as well as the Fifth Amendment's guarantee of Procedural Due Process (App. 3, 10). The latter is an issue of first impression in any American court. The district court denied relief and dismissed his petition (App. 14, 15), and Mr. Drach filed a timely notice of appeal to the United States Court of Appeals for the Tenth Circuit. At the same time, he requested the District Court to issue a Certificate of Appealability, asking the court to certify these two issues for appeal:

1. Whether the District Court erred in applying the statute of limitations contained in 28 U.S.C. § 2244(d)(1) to Mr.

Drach's first petition for a writ of *habeas corpus* under 28 U.S.C. § 2254, because when so applied, the statute of limitations violates the bar on suspending the privilege of the writ of *habeas corpus* contained in Article I, § 9, of the Constitution of the United States, as the courts are open and their process is unobstructed.

2. Whether the District Court erred in applying the statute of limitations contained in 28 U.S.C. § 2244(d)(1) to Mr. Drach's first petition for a writ of *habeas corpus* under 28 U.S.C. § 2254, because when so applied, it violates the guarantee of Procedural Due Process contained in the Fifth Amendment to the Constitution of the United States, as it prevents him from being able to protect himself against his unlawful detention in any meaningful forum.

(App. 1-2, 16).

When the District Court denied a Certificate of Appealability (App. 16), Mr. Drach requested the same from the Court of Appeals (App. 1-2). In an unpublished opinion issued on December 31, 2008, the Court of Appeals denied Mr. Drach's request for a Certificate of Appealability and dismissed his appeal (App. 2, 8).

Mr. Drach then sought a Certificate of Appealability from Justice Stephen Breyer in his capacity as Circuit Justice for the Tenth Circuit (App. 9). Justice

Breyer denied a Certificate of Appealability on January 14, 2009 (App. 9).

REASONS FOR GRANTING THE WRIT

Mr. Drach's petition for *certiorari* should be granted because it involves a question of fundamental national importance concerning how the American criminal justice system ought to deal with Constitutional error resulting in an erroneous conviction and sentence. In 1997, after a trial that did not remotely meet the Constitution's mandates of fairness and due process, Mr. Drach was convicted of a heinous crime which he always has maintained he did not commit. Since 2004, he has sought to right this wrong through relief from the courts, first in post-conviction relief proceedings before the courts of the State of Kansas, and then in federal *habeas corpus* proceedings pursuant to 28 U.S.C. § 2254. He has been represented by counsel at every stage. Because of a 1996 statute of limitations on federal *habeas* proceedings, however, the lower federal courts held that Mr. Drach is absolutely barred from bringing his good-faith constitutional claims before the United States courts.

In the Suspension Clause in Article I, § 9, of the Constitution, the Framers specifically sought to ensure that prisoners whose convictions were obtained in violation of the Constitution and laws of the United States always shall be able to bring at least one good-faith, non-frivolous challenge to the legal

propriety of their detention by means of a writ of *habeas corpus*, just as Parliament had provided a century earlier in two statutes. Since the seventeenth century, then, prisoners in the Anglo-American system of laws who allege in good faith that their liberties are being restrained unlawfully have had at least one meaningful opportunity to bring their claims before an appropriate court, an important part of Procedural Due Process. The Framers themselves described such a challenge as a fundamental part of the American people's traditions and conscience.

In 1996, however, Congress abruptly ended this system when it enacted the AEDPA. In §§ 101 and 106 of that Act, Congress enacted a one-year statute of limitations on all federal *habeas corpus* actions from state prisoners. As a result, people like Mr. Drach who did not file a federal *habeas* petition within one year of their conviction becoming final are spit out of the criminal justice system and must languish in prison with no hope of any legal recourse at all.

In this case, the lower courts ruled that Mr. Drach's challenge as to whether this fundamental alteration to the American criminal justice system comports with the Suspension Clause and Procedural Due Process is a question that does not even merit review. This Petition is Mr. Drach's last legally available recourse. His challenges under the Suspension Clause and Procedural Due Process – the latter an issue of first impression in any court in the United States – merit the issuance of a Certificate of

Appealability under 28 U.S.C. § 2253, and the Court of Appeals countermanded this Court's holdings in *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003), when it held otherwise.

I. In *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court established that, under 28 U.S.C. § 2253(c), a Certificate of Appealability should issue when the claims sought to be appealed are debatable among jurists of reason – that is, when reasonable jurists would find the district court's assessment of the applicant's constitutional claims debatable or wrong and could resolve them in a different manner.

A state prisoner cannot appeal the denial of a petition for writ of *habeas corpus* unless a Certificate of Appealability first has been issued by the District Court or by a "circuit justice or judge." 28 U.S.C. § 2253. A Certificate of Appealability is appropriate where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see* Rule 22(b), Federal Rules of Appellate Procedure.

The applicant has met this standard where "reasonable jurists would find the district court's assessment of [the petitioner's] constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S.

322, 338 (2003). To warrant a Certificate of Appealability, the claims sought to be appealed must be "debatable among jurists of reason," or different courts must be able to resolve the claims "in a different manner." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (applied to post-AEDPA *habeas* by *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)). Constitutional claims sought to be raised should be "adequate to deserve encouragement to proceed further." *Id.* (quoting *Gordon v. Willis*, 516 F.Supp. 911, 913 (N.D. Ga. 1980)).

II. The two issues Mr. Drach sought to appeal plainly meet the standards announced in *Slack* and *Miller-El* for the issuance of a Certificate of Appealability; the decision of the Tenth Circuit holding otherwise conflicts with those decisions of this Court.

Mr. Drach made a substantial showing of the denial of his Constitutional rights, thereby meeting the standard for a Certificate of Appealability under 28 U.S.C. § 2253(c).

Because the District Court did not rule on the underlying merits of the five grounds presented in Mr. Drach's petition, it only heard Mr. Drach's two arguments as to whether the statute of limitations in 28 U.S.C. § 2244(d)(1) should apply to this case (App. 10-12). At all points during this case, Mr. Drach made a substantial showing that the statute violates the prohibition on suspending *habeas corpus* contained in

Article I, § 9, of the Constitution when applied to a first *habeas* petition by a prisoner who consistently has maintained that he was wrongfully convicted. He also made a substantial showing that the statute violates the guarantee of Procedural Due Process contained in the Fifth Amendment.

The latter question – whether the statute of limitations violates Procedural Due Process – is an issue of first impression in any United States court. Neither this Court, nor any United States Court of Appeals, nor any state court ever has heard this issue. Additionally, the Tenth Circuit never definitively has held that § 2244(d)(1) does not violate the Suspension Clause *per se*, and that issue remains in flux nationally. As both questions which were before the District Court purely are issues of Constitutional interpretation, the Tenth Circuit would have reviewed them *de novo*. *United States v. Pompey*, 264 F.3d 1176, 1179 (10th Cir. 2001).

A. Whether applying the statute of limitations in 28 U.S.C. § 2244(d)(1) to this case effects a suspension of *habeas corpus* in violation of Article I, § 9, of the Constitution is an issue debatable among jurists, courts could resolve the issue differently, and the question deserves further proceedings.

The Suspension Clause in Article I, § 9, of the Constitution provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless

when in Cases of Rebellion or Invasion the public Safety may require it." Since the Civil War, this Court consistently has interpreted this provision to mean that grounds for disallowing prisoners from bringing one good-faith, non-frivolous challenge to the Constitutionality of their detention by means of a writ of *habeas corpus* cannot exist while the courts are open and their process unobstructed. Although the courts are open and their process is unobstructed, the statute of limitations contained in 28 U.S.C. § 2244(d)(1) prevents Mr. Drach from challenging the unconstitutional actions which resulted in the deprivation of his liberty.

The historical context of the Suspension Clause plainly illustrates that the Framers intended it to preserve the writ of *habeas corpus*, except in the most dire circumstances, as it then existed in English law – that is, to prevent *any* suspension of the Writ for first-time challenges to incarceration under the federal Constitution, even by means of a statute of limitations. Parliament created *habeas corpus* in its modern form (at least until Congress enacted the statute of limitations in 28 U.S.C. § 2244(d)(1) in 1996) in the Habeas Corpus Act 1640, 16 Car. 1, c. 10, to abolish the notorious Court of Star Chamber. The Act established by statute the positive right of "*any person* [who] shall hereafter be committed restrained of his Libertie or suffer imprisonment [by the Order or Decree of any such Court of Star Chamber]" to seek "*in every such case* . . . upon demand or motion

made by his Councell . . . a Writ of Habeas Corpus." *Id.* at § VI (emphasis added).

After the Restoration, Parliament expanded the Writ, making the right to seek *habeas corpus* available in *every* case in which a prisoner alleged that he was detained unlawfully, without any limitation. Habeas Corpus Act 1679, 31 Car. 2, c. 2. The only single restriction was that a prisoner who failed to seek *habeas* relief within two terms of court after his imprisonment could not seek the writ while the courts formally were not in session. *Id.* at § IV.

This was the Writ as the Framers of our Constitution knew it. To them, it was elementary that if "a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court to recover his liberty." *Holmes v. Jennison*, 39 U.S. (14 Peters.) 540, 564 (1840). The "grand purpose" of *habeas corpus* from the seventeenth century onward was the "protection of individuals against erosion of their right to be free from wrongful restraints." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). In so doing, the Writ furthers the cardinal principle underlying the whole of our criminal jurisprudence: "it is better that ten guilty persons escape, than that one innocent suffer." William Blackstone, 4 COMMENTARIES 352 (1st ed. 1765-69); *c.f.* John Fortescue, *DE LAUDIBUS LEGUM ANGLIAE* 94 (Francis Gregor trans., Andrew Amos ed., Robert Clark 1874) (c. 1470). Since at least the fifteenth century, this has been the "fundamental value determination of our

society." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

Habeas corpus was very important to the American colonists. Thus, during the period of the Articles of Confederation, most state constitutions protected the Writ. William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 95-99 (1980). The Articles of Confederation themselves, however, made no mention of the Writ. *Id.* In order to reassert the importance of securing the Writ, the delegates to the Constitutional Convention adopted the text now contained in Article I, § 9, of the Constitution. *Id.*

The debates of the Framers at the Constitutional Convention of 1787 who crafted the Suspension Clause are most instructive on how they intended the Suspension Clause to further *habeas*'s "grand purpose" of protecting individuals from the erosion of their right to be free from wrongful restraints (i.e., the abuses of the Star Chamber). In those debates, the Framers made clear that they would not tolerate any time limitations on the usage of the Great Writ. Charles Pinkney initially proposed the clause as: "The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government *in the most expeditious and ample manner*; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, *and for a limited time not exceeding ___ months.*" James Madison, THE DEBATES OF THE FEDERAL CONVENTION OF 1787 (Aug. 20, 1787) (2007 ed.), *available at* http://www.constitution.org/dfc/dfc_0000.htm (emphasis added).

Eight days later, Mr. Pinkney moved "that the writ should not be suspended but on the most urgent occasions, & *then only for a limited time, not exceeding twelve months.*" *Id.* at Aug. 28, 1787 (emphasis added). Immediately, John Rutledge disagreed: "Mr. RUTLIDGE was for declaring the Habeas Corpus inviolable. He did not conceive that a suspension could ever be necessary at the same time through all the States." *Id.* Accordingly, Gouverneur Morris refined Mr. Pinkney's language and "moved that 'The privilege of the writ of Habeas Corpus shall not be suspended; unless where in cases of Rebellion or invasion the public safety may require it.'" *Id.*

Still, disagreement persisted, but that disagreement only was as to whether there should be any qualifiers whatsoever to Mr. Morris's proposed clause. "Mr. WILSON doubted whether in any case a suspension could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail." *Id.* Thereafter, the delegates voted on the clause. They agreed unanimously on the first part of the clause, "The privilege of the writ of Habeas Corpus shall not be suspended." *Id.* The vote was seven states to three states in favor of including the language regarding suspension in times of invasion or rebellion. *Id.*

The historical record unmistakably establishes that the Framers considered and rejected any notion that there might be a time limitation on *habeas corpus*. They codified that principle in the Suspension Clause. Their choice echoed Parliament's Habeas

Corpus Acts of the preceding century. The only debate in Philadelphia was as to whether there could be such dire circumstances as to warrant Congress suspending the Writ. A century later, this Court construed that those dire circumstances existed only if, due to rebellion or invasion, the courts were closed or their process obstructed. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 21 (1866).

Writing in THE FEDERALIST, Alexander Hamilton observed that the Suspension Clause protected against "[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions," which are "the great engines of judicial despotism; and these have all relation to criminal proceedings." THE FEDERALIST (NO. 83), *available at* http://www.yale.edu/lawweb/avalon/federal/fed83.htm (2007). He likened it to the right to trial by jury, which, "aided by the habeas-corpus act, seems therefore to be alone concerned in the question. And both of these are provided for, *in the most ample manner*, in the plan of the convention." *Id.* (emphasis added).

The Framers plainly believed that because the Writ of *habeas corpus* was at the core of the British Constitution, it also should be at the core of the Constitution of the United States. Upon ratification of the Constitution, Congress enacted the procedure for seeking a writ of *habeas corpus* in the Judiciary Act of 1789, the first act of the first Congress. *See* An Act to establish the Judicial Courts of the United States, § 14, 1 Stat. 73 (1789).

Throughout American history until 1996, when Congress enacted the statute of limitations contained in 28 U.S.C. § 2244(d)(1) as part of the AEDPA, *habeas* remained precisely as the Framers had ordained in the Suspension Clause. This Court often declared, "'There is no higher duty than to maintain [the writ of *habeas corpus*] unimpaired.'" *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)); *see Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807). As such, when a congressional change to *habeas* procedure renders the writ "inadequate [or] ineffective to test the legality of a person's detention," it violates the Suspension Clause. *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

The statute of limitations in 28 U.S.C. § 2244(d)(1) does exactly that: it impairs the ability of state prisoners held in violation of the Constitution or laws of the United States to seek the Great Writ in federal court. In § 2244(d)(1), Congress departed from the entire history of *habeas corpus* practice in the Anglo-American legal world and set a time limit on when persons held in custody pursuant to state court judgments can seek *habeas corpus*.

Under § 2244(d)(1), a state prisoner is barred from seeking the Writ in federal court unless he has exhausted his state remedies and brings his claim within one year of the date when (1) the date the state court's judgment became final, (2) a state impediment to his seeking the writ is lifted, (3) a new Constitutional right was asserted by this Court and made retroactively applicable to cases on collateral

review, or (4) the factual predicate of his claim or claims could have been discovered through due diligence. 28 U.S.C. § 2244(d)(1). The one-year limitation only is tolled either during the pendency of the prisoner's state post-conviction or other collateral review, *id.* at (d)(2), or equitably. *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

The purpose of *habeas corpus* in the United States always has been to ensure that individuals are protected against wrongful, unlawful, or unconstitutional restraint of their liberty. It guarantees that any such restraint be in accordance with law. The Framers sought to secure exactly that in providing that *habeas corpus* shall not be suspended except in the direst of emergencies, where the courts are not open or cannot function. A prisoner who does not have the ability to seek *habeas* relief while courts are open and functioning has no means by which to challenge his unlawful restraint.

Moreover, unlawful restraints in felony cases do not last merely for one year after conviction. In *Vasquez v. Hillery*, the petitioner, a state prisoner in California, successfully relieved through a writ of *habeas corpus* the unconstitutional restraint of his liberty twenty-three years after his conviction. 474 U.S. 254, 256 (1986). Indeed, "prior to AEDPA . . . a prisoner was generally entitled, and even encouraged, to take the time necessary to construct a petition setting forth every factual and legal basis on which he contended his custody was unlawful." *Ross v. Artuz*, 150 F.3d 97, 102 (2d Cir. 1998) (citing

McCleskey v. Zant, 499 U.S. 467, 493 (1991)). Today, however, under the AEDPA, the petitioner in *Vasquez* would continue to be restrained of his liberty in violation of the Constitution of the United States, with no possibility of relief.

With this background and context, how can the statute of limitations in 28 U.S.C. § 2244(d)(1) not be a suspension of *habeas corpus*? It is patently unreasonable to limit prisoners restrained unlawfully or unconstitutionally to seeking relief for only one year. "The Suspension Clause . . . would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing." *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) (emphasis in the original). In making the Suspension Clause into just such a "sham," § 2244(d)(1) violates the Constitution.

Section 2244(d)(1) plainly suspends the right of state prisoners to ensure that they are not being held unlawfully. The one-year time limitation does nothing to ensure justice has been served. Rather, it exists in opposition to our historical and cultural proscription on holding one unlawfully or unconstitutionally.

To Mr. Drach and other persons in his position who were convicted wrongfully on unconstitutional or illegal bases, § 2244(d)(1) is an absolute bar to relief. These are wholly innocent people who cannot meet the exacting "newly discovered evidence" gateway of

House, who have no grounds for "equitable tolling" under *Burger*, but whose convictions nonetheless were obtained solely because of actions or procedures which are contrary to the Constitution or clearly established federal law as announced by this Court. Under § 2244(d)(1), persons in this position who did not file a *habeas* petition within one year of their direct appeal forever are barred from challenging their conviction and simply must suffer in prison, many – like Mr. Drach – for the rest of their lives. This is precisely the situation which the Framers designed the Suspension Clause to avoid.

That this issue is debatable among jurists of reason is undeniable. Two hundred – and in some cases nearly four hundred – years of precedent support Mr. Drach's argument. Moreover, many eminent jurists have voiced arguments regarding the Constitutionality of 28 U.S.C. § 2244(d)(1) similar to those raised by Mr. Drach. *See, e.g.*, Lisa L. Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1 (Fall 2004); Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171 (Spring 2003); *Note: The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578 (April 1998); Thomas M. Place, *The Claim is Cognizable But the Petition is Untimely: The Pennsylvania Supreme Court's Recent Collateral Relief Decisions*, 10

TEMP. POL. & CIV. RTS. L. REV. 49 (Fall 2000); Allen E. Schoenberger, *The Not So Great Writ: The European Court of Human Rights Finds Habeas an Inadequate Remedy: Should American Courts Reexamine the Writ?*, 56 CATH. U. L. REV. 47 (Fall 2006); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Cases*, 77 N.Y.U. L. REV. 699 (June 2002); Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343 (2001); Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals*, 18 J. L. & POLITICS 773 (Summer 2002).

The question of whether applying the statute of limitations in 28 U.S.C. § 2244(d)(1) to Mr. Drach's case effects a suspension of *habeas corpus* in violation of Article I, § 9, of the Constitution therefore plainly fits this Court's standard for issuance of a Certificate of Appealability as announced in *Slack v. McDaniel*, 529 U.S. at 473, and *Miller-El v. Cockrell*, 537 U.S. at 322. It is an issue debatable among jurists of reason, courts could resolve the issue differently, and the question deserves further proceedings. The decision of the Tenth Circuit holding otherwise conflicts with this Court's decisions in *Slack* and *Miller-El*.

B. Whether applying the statute of limitations in 28 U.S.C. § 2244(d)(1) to this case violates Procedural Due Process is an issue debatable among jurists, courts could resolve this issue differently, and the question deserves further proceedings.

Mr. Drach also sought to appeal the issue of whether the statute of limitations in 28 U.S.C. § 2244(d)(1) violates Procedural Due Process, in violation of the Fifth Amendment. No court in the United States, state or federal, has heard this issue. In its opinion denying a Certificate of Appealability and dismissing Mr. Drach's appeal, the Tenth Circuit held that this was merely a "repackaging" of the Suspension Clause argument (App. 7). But that is far from accurate. The Suspension Clause and the Due Process Clause are two separate Constitutional provisions with two different jurisprudences.

It is fundamental to the basic structure of freedom in the United States that when an American citizen is held in custody by domestic authorities in violation of the Constitution or laws of the United States, that citizen must have some meaningful judicial forum in which to raise claims to free himself of that restraint of his liberty. If it were otherwise, no longer would the people of the United States be living under a government of laws, but rather every citizen would be helpless against continuing unlawful deprivation of liberty by the Executive accomplished by means of illegal actions.

Throughout American history, the judiciary always has provided some meaningful forum in which to challenge unconstitutional judicial actions resulting in a continuing violation of one's right to life, liberty, and property. Such a challenge is a fundamental right and liberty of a citizen in our Constitutional form of government. Protecting this right is one purpose of the Constitution's guarantee of Procedural Due Process. In other words, prisoners have "rights of collateral attack" inherent in Procedural Due Process. *United States v. Hayman*, 342 U.S. 205, 219 (1952). Thus, once an act of Congress prevents a prisoner from having any meaningful forum in which to remedy continuing violations of his right to life, liberty, or property, Congress violates a canon of our society and violates the guarantee of Procedural Due Process contained in the Fifth Amendment.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 314 U.S. 123, 168 (1951)). If Congressional legislation creates a system which bars review of continued unconstitutional imprisonment in any meaningful forum, that legislation and the system it creates violates this basic tenet of our system of justice. Applying 28 U.S.C. § 2244(d)(1), Mr. Drach no longer has any meaningful forum in which to raise claims against the continuing unlawful violation of his rights to liberty and property by the state. As noted above, whether § 2244(d)(1) violates Procedural

Due Process in this manner is an issue of first impression in the federal courts.

A procedure "is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Medina v. California*, 505 U.S. 437, 445 (1992) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). In order to determine whether a procedure is fundamental, the Court looks to historical and contemporary practice and to whether the procedure "transgresses any recognized principle of 'fundamental fairness' in operation." *Id.* at 446-48.

The "central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera v. Collins*, 506 U.S. 390, 398 (1993). This principle, like the analogous formulation of Blackstone and Fortescue, *ante* at Point II(A), certainly is one so rooted in the traditions and conscience of our people as to be fundamental. In the United States, there always have been judicial procedures specifically designed to ensure access to a meaningful forum and to correct errors which resulted in a conviction contrary to the federal laws and the Constitution.

Section 2244(d)(1), however, deprives *all* state prisoners who fail to meet its terms, but whose continued detention nonetheless is unlawful and unconstitutional, from having any meaningful forum to correct the illegal deprivation of their rights by the government. It denied to Mr. Drach any possibility of

his having the gross Constitutional violations which resulted in his conviction being reviewed meaningfully by the courts. Although Mr. Drach is being held in custody in violation of the Constitution, § 2244(d)(1) deprives him of any meaningful judicial forum in which to raise his claims so as to free himself of the unconstitutional restraint of his liberty. He has no recourse to challenge the unconstitutional judicial actions which resulted in the continuing violation of his inalienable right to liberty.

The District Court made no substantive ruling on this argument. Instead, it held that, "Because petitioner's constitutional claim is covered by the Suspension Clause, . . . it must be analyzed under the standard applicable to that specific constitutional provision, and not under the general rubric of due process," citing *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998), for support (App. 13).

But this Court did not discuss Procedural Due Process in *County of Sacramento*. Instead, the Court analyzed a Fourth Amendment seizure claim also reargued under the rubric of Substantive Due Process. *Id.* at 842-43. The respondent argued for the "application of principles of generalized substantive due process to a motor vehicle passenger's claims for injury resulting from reckless police pursuit." *Id.* at 843. The Court held that because where "a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the

rubric of *substantive* due process." *Id.* (emphasis added).

In this case, the District Court paraphrased this language from *County of Sacramento*, but omitted the word "substantive" (App. 13). Substantive Due Process is the "doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate government objective." BLACK'S LAW DICTIONARY 517 (7th ed. 1999). Conversely, Procedural Due Process is based not on "reasonableness," but rather on the idea of "fundamental fairness." *Snyder*, 291 U.S. at 105.

Mr. Drach never once made any mention of Substantive Due Process in any argument before the District Court. Instead, he argued that it is a basic and fundamental principle of our system of the rule of law that when a person is incarcerated unconstitutionally or unlawfully, that person must have some meaningful judicial forum in which to raise claims to free himself of that restraint of his liberty. If Congress deprives him of these "rights of collateral attack," its Act violates Procedural Due Process. *Hayman*, 342 U.S. at 219. This argument had nothing to do with Mr. Drach's separate argument under the Suspension Clause or some argument, not presented, rooted in the doctrine of Substantive Due Process.

Whether § 2244(d)(1)'s statute of limitations violates Procedural Due Process is an issue of first

impression in any American court. It is not unavoidably intertwined with a Suspension Clause argument as the District Court and the Court of Appeals held. Mr. Drach's point in raising the issue of Procedural Due Process is that even if § 2244(d)(1) does not violate the Suspension Clause by rendering the writ inadequate and ineffective to test the legality of his detention, it has deprived him of any ability to attack the ongoing deprivation of his liberty based on unconstitutional actions at trial.

Both historic and contemporary practice until 1996 unquestionably evince that § 2244(d)(1) transgresses the fundamental fairness inherent in the right of collateral attack. As such, applying it to Mr. Drach violates the Procedural Due Process guaranteed by the Fifth Amendment.

Whether § 2244(d)(1) offends a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental – the right of a citizen to challenge by meaningful collateral attack the government's continuing unconstitutional restraint on his right to liberty – fits this Court's standards for issuance of a Certificate of Appealability as announced in *Slack v. McDaniel*, 529 U.S. at 473, and *Miller-El v. Cockrell*, 537 U.S. at 322. It is an issue debatable among jurists (especially since it is an issue of first impression), courts could resolve the issue differently, and the question deserves further proceedings. The decision of the Tenth Circuit holding

otherwise conflicts with this Court's decisions in *Slack* and *Miller-El*.

CONCLUSION

This Court should issue its writ of *certiorari* to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROGER DRACH, Petitioner-Appellant, v. LOUIS BRUCE, Respondent-Appellee.	No. 08-3052 (D.C. No. 07-CV-03135-SAC) (D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

(Filed Dec. 31, 2008)

Before **LUCERO**, **TYMKOVICH**, and **HOLMES**, Circuit Judges.

Petitioner-Appellant Roger Drach, a Kansas state prisoner, seeks a certificate of appealability ("COA")

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* This Order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1. After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this matter. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

in order to challenge the district court's dismissal of his petition for writ of habeas corpus as untimely. Mr. Drach concedes that he did not file his petition within one year of the date on which his judgment became final, as required by 28 U.S.C. § 2244(d)(1). Instead, he argues that the limitations period is an unconstitutional suspension of the writ. U.S. Const. art. I, § 9, cl. 2. We find that no reasonable jurist could conclude that the district court's dismissal was incorrect. Exercising jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a), we **DENY** Mr. Drach's application for a COA and **DISMISS** his appeal.

I. BACKGROUND

On August 19, 1994, Deanna Drach, the wife of Petitioner Roger Drach, died in their home from a gunshot wound to the chest. Mr. Drach was charged with her murder and tried in Finney County, Kansas. He has always maintained that he is innocent and that his wife committed suicide. On October 31, 1997, Mr. Drach was convicted by a jury of first-degree premeditated murder, aggravated battery with great bodily harm, and criminal possession of a weapon. He appealed his conviction, arguing that the trial court erred in (1) refusing to allow his expert witness to testify regarding a purported suicide note, (2) refusing to find that a prosecutor had a conflict of interest, (3) allowing a "surprise witness" to testify for the state, and (4) admitting hearsay testimony. On April 18, 2000, the Kansas Supreme Court entered its final opinion, affirming the conviction. *State v. Drach,* 1

P.3d 864 (Kan. 2000). Mr. Drach chose not to seek review by the Supreme Court of the United States. His conviction became final on July 17, 2000, when the time to file a petition for certiorari expired.

Mr. Drach took no further action until April 16, 2004, when he filed a motion for post-conviction relief under Kansas law. The motion was denied. *Drach v. Bruce,* 136 P.3d 390 (Kan. 2006), *cert. denied,* 127 S. Ct. 1829 (2007). He then filed a petition for writ of habeas corpus, 28 U.S.C. § 2254, in the United States District Court for the District of Kansas. His claims of error are largely the same as those he raised on direct appeal.[1] Mr. Drach conceded that the limitations period for filing a habeas petition expired in July 2001. He also admitted that "he could not establish an 'actual innocence' claim in the manner prescribed by the Supreme Court . . . because he had no 'new evidence.'" Aplt. Br. at 25. Finally, he admitted that there were no "rare and exceptional circumstances beyond his control necessitating equitable tolling of § 2244(d)'s statute of limitations." Aplt. Br. at 26 (quotation marks omitted). Mr. Drach's only argument is that the limitations period, as applied to him, is an unconstitutional suspension of the writ of habeas corpus. Relying on our decision in *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir. 1998), the district court rejected his claim. It dismissed Mr. Drach's

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[1] He added a claim of ineffective assistance of counsel and violation of the Sixth Amendment in that "trial counsel deprived him of his right to testify on his own behalf." Aplt. Br. at 19.

petition and denied his motion for a COA. This appeal followed.

II. DISCUSSION

A state prisoner cannot appeal the denial of a petition for writ of habeas corpus unless a COA is issued, first. 28 U.S.C. § 2253(c)(1)(A). In order to receive a COA, a prisoner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the petition is denied on procedural grounds, the prisoner must show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

There is a one year period of limitations on petitions for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As relevant here, the limitations period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The statute is tolled while any state post-conviction proceedings are pending. 28 U.S.C. § 2244(d)(2). It is uncontested that Mr. Drach's conviction became final in July 2000 and that the limitations period expired well before Mr. Drach filed his first motion for post-conviction relief in April 2004.

Mr. Drach argues that the limitations period is unconstitutional. The Constitution guarantees that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or

Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. But not every restriction on the writ rises to the level of a suspension. *Felker v. Turpin,* 518 U.S. 651, 664 (1996) ("[J]udgments about the proper scope of the writ are 'normally for Congress to make.'") (quoting *Lonchar v. Thomas,* 517 U.S. 314, 323 (1996)). We have previously recognized that, in some cases, there may be "serious constitutional questions" about the limitations period. *Miller,* 141 F.3d at 978. Nonetheless, § 2244(d)(1) is constitutional, provided it does not "render[ ] the habeas remedy 'inadequate or ineffective' to test the legality of detention." *Id.* at 977 (quoting *Swain v. Pressley,* 430 U.S. 372, 381 (1977)). "The burden is on the petitioner to demonstrate inadequacy and ineffectiveness." *Id.*

Mr. Drach cannot carry this burden. In order to avoid any unconstitutional applications, we have held that § 2244(d)(1) is "not jurisdictional and . . . may be subject to equitable tolling." *Miller,* 141 F.3d at 978. Tolling is limited to "'rare and exceptional' circumstances" and "should not be used to thwart the intention of Congress in establishing a statute of limitations for habeas claims." *Burger v. Scott,* 317 F.3d 1133, 1141 (10th Cir. 2003); *see also March v. Soares,* 223 F.3d 1217, 1220 (10th Cir. 2000) ("[Tolling] is only available when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control."). Mr. Drach concedes that there are no exceptional circumstances that would

warrant tolling the limitations period in this case. In fact, he has failed to give any reasons for why he waited nearly four years before seeking post-conviction relief. Absent any explanation, he cannot show that the opportunities he voluntarily passed up were inadequate or ineffective.

Mr. Drach attempts to distinguish *Miller,* noting that Miller admitted his guilt and was only challenging the length of his sentence. He argues that the constitutional concerns are more acute when, as here, the question is whether an innocent man has been wrongly convicted. It is true that our holdings do not foreclose the possibility that § 2244(d)(1) might be unconstitutional in cases of actual innocence. *Miller,* 141 F.3d at 978. But Mr. Drach concedes that he cannot establish actual innocence. "Actual innocence" requires more than the prisoner's continued insistence that he did not commit the crime. He must produce credible, new evidence, not presented at trial, sufficient to establish that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell,* 547 U.S. 518, 537 (2006) (quoting *Schlup v. Delo,* 513 U.S. 298, 327 (1995)). Mr. Drach has no new evidence to present. His declaration of innocence, by itself, does not lessen his burden to prove that the limitations period renders habeas relief inadequate or ineffective.

Finally, Mr. Drach argues that the application of the limitations period violates his due process rights. He claims that § 2244(d)(1) "creates a system which

bars review of continued unconstitutional imprisonment in any meaningful form." Aplt. Br. at 57; *see also Matthews v. Eldridge,* 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)).

Mr. Drach's due process argument, however, amounts to no more than a repackaging of his suspension clause argument. Consequently, this argument is unavailing. The essence of his complaint is the same – *viz.*, that § 2241(d)(1) unconstitutionally prevents him from contesting his unlawful imprisonment. As noted, Mr. Drach has failed to offer any explanation as to why he did not file his petition within the limitations period. He admits that he has no new evidence of his innocence. Nor has he suggested that there has been an intervening change in the law. The arguments in his habeas petition basically are the same ones that he raised on direct appeal. Instead, Mr. Drach has simply failed to take advantage of the opportunity to file a habeas petition until it was too late. Since he cannot establish that a year was "inadequate or ineffective to test the legality" of his conviction, he also cannot show that he was denied "any meaningful form" of review.

III. CONCLUSION

In light of our previous holding in *Miller,* the district court correctly concluded that the application

of § 2244(d)(1)'s limitations period was not unconstitutional. No reasonable jurist could have found otherwise. Accordingly, we **DENY** Mr. Drach's application for a COA and **DISMISS** his appeal.

Entered for the Court

Jerome A. Holmes
Circuit Judge

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

January 14, 2009

Mr. Dennis Owens
7th Floor, Harzfeld's Building
1111 Main Street
Kansas City, MO 64105

Re: Roger Drach
v. Louis Bruce, Warden
Application No. 08A619

Dear Mr. Owens:

The application for a certificate of appealability in the above-entitled case has been presented to Justice Breyer, who on January 14, 2009 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Cynthia Rapp
Cynthia Rapp
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROGER DRACH,

Petitioner,

v. **CASE NO. 07-3135-SAC**

LOUIS BRUCE,

Respondent.

ORDER

Petitioner proceeds with counsel on a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner acknowledges his petition is not filed within the one year limitation period in 28 U.S.C. § 2244(d)(1), but contends the petition should be considered because the limitation period in § 2244(d)(1) as applied to a prisoner's first habeas petition constitutes an unconstitutional suspension of the writ and violates the prisoner's right to procedural due process. Having reviewed respondent's preliminary response, and petitioner's reply, the court finds no merit to petitioner's constitutional arguments, and concludes the petition should be dismissed as time barred.

The Antiterrorism and Effective Death Penalty Act (AEDPA) enacted in 1996 imposed a one year limitation period on habeas corpus petitions filed by prisoners confined pursuant to a state court judgment. 28 U.S.C. § 2244(d)(1). The running of that one year limitation period is subject to tolling if petitioner

pursues state post-conviction relief or other collateral review. *See* 28 U.S.C. § 2244(d)(2) (running of limitations period is tolled while properly filed state post-conviction proceeding and appeal therefrom is pending).

In the present case, petitioner's conviction became final in July 2000 when the time for seeking certiorari review in the United States Supreme Court expired. *See Locke v. Saffle,* 237 F.3d 1269 (10th Cir. 2001) ("direct review" in 28 U.S.C. § 2244(d)(1)(A) includes period in which petitioner can file a petition for a writ of certiorari from United States Supreme Court, whether or not such a petition is filed). Petitioner did not seek post-conviction relief in the state courts within the one year provided by § 2244(d)(1) to toll the running of the federal limitation period, and petitioner's pursuit of post-conviction relief in a motion filed in the state courts in April 2004 had no tolling effect on the already expired limitations period.[1] *See Fisher v. Gibson,* 262 F.3d 1135, 1142-43 (10th Cir. 2001) (application for post-conviction relief filed after expiration of one-year limitation period has no tolling effect), *cert. denied,* 535 U.S. 1034 (2002).

Petitioner recognizes he did not file the instant habeas application within the time period provided by

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[1] Shortly before filing the instant habeas application, petitioner asked the Kansas Supreme Court to recall the mandate and reinstate petitioner's direct appeal. Petitioner's motion for this court to take judicial notice of the Kansas Supreme Court's denial of that request is granted.

§ 2244(d)(1), and concedes he cannot make a showing that would entitle him to any equitable tolling of that one year period.[2] *See Marsh v. Soares,* 223 F.3d 1217, 1220 (10th Cir. 2000) (equitable tolling available only "when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control"), *cert. denied,* 531 U.S. 1194 (2001). He contends, however, that application of the § 2244(d)(1) limitation period to a prisoner's first federal habeas application violates the Suspension Clause, the Constitution's prohibition against suspending the writ.[3] The court disagrees.

Although petitioner correctly notes the Supreme Court has not specifically ruled on this issue, the Tenth Circuit has. Where no claim of actual innocence is involved, § 2244(d) does not violate a petitioner's rights under the Suspension Clause. *Miller v. Marr,* 141 F.3d 976 (10th Cir.) (citations omitted), *cert. denied,* 525 U.S. 891 (1998). In the present case,

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[2] Petitioner cites his ignorance of the limitation period until counsel was retained in 2004. However, "ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." *Marsh v. Soares,* 223 F.3d 1217, 1220 (10th Cir. 2000) (quotation omitted). *See also Miller v. Marr,* 141 F.3d 976, 978 (10th Cir. 1998) (equitable tolling not justified by petitioner not knowing about AEDPA time limitation).

[3] The Suspension Clause reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

petitioner concedes he cannot establish a claim of "actual innocence" as provided in *House v. Bell,* 547 U.S. 518 (2006), because there is no new exculpatory evidence to show that a constitutional violation has resulted in the conviction of one who is actually innocent or incompetent. *Miller,* 141 F.3d at 978. Nevertheless, petitioner maintains he did not murder his wife, and argues he is constitutionally entitled to judicial review of the merits of his allegations of unconstitutional and unlawful actions that resulted in his wrongful state conviction.

Petitioner bears the burden of demonstrating that application of the § 2244(d)(1) limitation period in his case rendered the habeas remedy "inadequate or ineffective" to test the legality of his detention. *Miller,* 141 F.3d at 977. The court finds petitioner has not sustained this burden.

Petitioner also argues the limitation period in § 2244(d)(1) violates his rights to procedural due process by denying petitioner a meaningful forum to raise his claims. Because petitioner's constitutional claim is covered by the Suspension Clause, however, it must be analyzed under the standard applicable to that specific constitutional provision, and not under the general rubric of due process. *County of Sacramento v. Lewis,* 523 U.S. 833, 843 (1998).

Finding no merit to petitioner's constitutional challenge to application of the § 2244(d)(1) limitation period in this matter, the court concludes the petition

must be dismissed because it was not filed within the time provided by that statute.

IT IS THEREFORE ORDERED that petitioner's Motion to Take Judicial Notice of Denial of Motion to Recall the Mandate of The Supreme Court of Kansas (Doc. 4) is granted.

IT IS FURTHER ORDERED that the petition is dismissed as time barred.

IT IS SO ORDERED.

DATED: This 22nd day of February 2008 at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JUDGMENT IN A CIVIL CASE

ROGER DRACH,

Petitioner,

v. **CIVIL NO. 07-3135-SAC**

LOUIS BRUCE,

Respondent.

( ) **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **DECISION BY THE COURT.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition is dismissed as time barred.

Entered on the docket 02/22/08

Dated: February 22, 2008 **INGRID A. CAMPBELL,**
ACTING CLERK

s/S. Nielsen-Davis
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

ROGER DRACH,

Petitioner,

v.

CASE NO. 07-3135-SAC

LOUIS BRUCE,

Respondent.

ORDER

Petitioner proceeds with counsel on a petition for a writ of habeas corpus under 28 U.S.C. § 2254 which the court dismissed as time barred on February 22, 2008. Before the court is petitioner's motion for a certificate of appealability.

To obtain a certificate of appealability for his appeal, petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1) and (2). Petitioner must also show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The court finds petitioner has made no such showing in this case.

IT IS THEREFORE ORDERED that petitioner's motion for a certificate of appealability (Doc. 9) is denied.

IT IS SO ORDERED.

DATED: This 19th day of March 2008 at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge